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Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased)

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-21 OF 2009(W)
ARIFIN ZAKARIA CJ (MALAYA), ZULKEFLI AND MOHD GHAZALI FCJJ
22 MARCH 2010

C

Civil Procedure — Limitation of action — Trustee — Action by beneficiary to recover life insurance policy monies held by insurer — Whether action founded on contract or on trust — Whether any period of limitation would apply — Limitation Act 1953 s 22(1)(b)

D

Insurance — Life insurance — Trust of life policy — Action by wife to recover monies under husband's life insurance policy — Whether insurer trustee of policy monies — Whether action founded on contract or on trust — Whether action time-barred — Civil Law Act 1956 s 23(1) — Limitation Act 1953 s 22(1)(b)

E

Limitation — Trusts — Trust property — Moneys under life insurance policy — Action by wife to recover sum secured by policy — Whether action founded on contract or trust — Whether action time-barred — Civil Law Act 1956 s 23(1) — Limitation Act 1953 s 22(1)(b)

F

Trusts and Trustees — Trust property — Moneys under life insurance policy — Whether insurer trustee of policy monies in favour of beneficiary wife — Action by wife to recover policy monies — Whether action founded on contract or trust — Whether action time-barred — Civil Law Act 1956 s 23(1) — Limitation Act 1953 s 22(1)(b)

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On 12 June 1992 the deceased took out a policy of life insurance with the appellant. The policy was for the benefit of his wife ('the respondent'). He passed away on 2 March 1993 leaving behind the respondent. A claim under the policy was then made by the respondent against the appellant, but was rejected by the appellant. It was not until 16 July 2004 that this claim was filed by the respondent, ie more than 11 years after the death of the deceased. The appellant resisted the claim on two grounds, namely: (i) that the claim was time barred by virtue of s 6(1) of the Limitation Act 1953 ('LA'); and (ii) that the policy had lapsed. The High Court found in favour of the appellant

I

and the claim was dismissed. The Court of Appeal in a unanimous decision reversing the High Court judge's findings held that in the absence of the handing over of the trust property to an appointed trustee or trustees pursuant to s 23 of the Civil Law Act 1956 ('CLA') or a legal representative, the trust property (the sum secured by the policy) remained in the hands of the appellant as bare trustee from the date of the death of the deceased. The Court of Appeal also held that the appellant having declared that it will pay the insurance money directly to the beneficiary, upon the demised of the deceased prior to the maturity date, the appellant must be declared to have been appointed as trustee consistent with s 23(2) of the CLA. Leave to appeal was granted to the appellant on the following three questions: (i) whether a policy of life insurance effected by the insured on his own life and expressed to be for the benefit of his wife, pursuant to s 23(1) of the CLA will upon the death of the insured constitute the issuer of the policy (insurer) as a bare trustee from the date of death of the insured, and therefore any action brought by the beneficiary against the insurer to recover the proceeds of the insurance policy will fall within the provisions of s 22(1)(b) of the LA; (ii) whether a declaration by an insurer in a policy of life insurance effected pursuant to s 23(1) of the CLA that they will pay the proceeds of the policy upon the death of the insured will amount to the insurer being constituted as an express trustee or in the alternative a constructive trustee over the proceeds of the policy; and (iii) whether a claim by the beneficiary on the policy containing a declaration by the insurer that they will pay the proceeds of the policy upon the death of the insured, will constitute a claim on a contract, and that in the circumstances as found, such a claim is barred by limitation pursuant to s 6(1)(a) of the LA.

Held, allowing the appeal with cost here and below:

(1) By s 23(1) of the CLA a statutory trust is created in favour of the objects named in the policy and the moneys payable under the policy shall not so long as any object of the trust remained unperformed become part of the estate of the insured or be subject to the debt of the insured. These provisions protect the interests of the spouse and children of the insured in the moneys payable under the policy against claim by the insured's creditors (see para 9).

(2) There is nothing in s 23 of the CLA purporting to appoint the appellant as trustee for the policy. Section 23(4) merely provides that in default of any appointment of a trustee or trustees by the insured then the insured or his or her legal personal representatives will be the trustee of the policy. The fact that the policy is vested in the trustee for the benefit of the beneficiary does not mean that upon the death of the insured the money is automatically held on trust by the appellant for

A the benefit of the beneficiary as bare trustee. There is nothing in s 23 or in the terms and conditions of policy itself to support such contention (see para 16).

(3) Based on the provisions in s 166 of the Insurance Act 1996 ('the Act'), it is clear that an insurer is not deemed a trustee of the policy moneys. In fact, the Act provides that in default of a trustee being appointed, the nominee or a public trustee shall be appointed as trustee of the policy moneys. Therefore failure on the part of the appellant to pay the policy moneys over to the appointed trustee amounted to a breach of its contractual obligation to the deceased or his nominee (see para 18).

(4) The relationship between the appellant and the insured, and on his death his personal representatives, was a contractual one and the appellant was at no time the trustee of the moneys payable under the policy. Therefore, in the event the appellant acted in breach of the terms and conditions as spelt out in the policy, it was for the personal representatives to take the necessary legal action against the appellant. Whether any money was due and payable under the policy was always subject to the terms and conditions of the policy. The relationship between the insurer and insured was purely a contractual relationship (see para 19).

(5) Bare trust, is where the trustee under a trust has no obligation except to hand over the trust property to a person entitled to it. The appellant could not be said to be holding any money as bare trustee for the respondent (see para 20).

(6) Questions (a) and (b) were answered in the negative and question (c) in the positive (see para 22).

[Bahasa Malaysia summary

Pada 12 Jun 1992 si mati telah mengambil polisi insurans hayat dengan perayu. Polisi itu adalah untuk faedah isterinya ('responden'). Dia telah meninggal dunia pada 2 Mac 1993 dan meninggalkan responden. Satu tuntutan di bawah polisi itu kemudian telah dibuat oleh responden terhadap perayu, tetapi telah ditolak oleh perayu. Hanya pada 16 Julai 2004 tuntutan ini difailkan oleh responden, iaitu lebih dari 11 tahun setelah kematian si mati. Perayu menentang tuntutan itu atas dua alasan, iaitu: (i) bahawa tuntutan itu telah luput had masa menurut s 6(1) Akta Had Masa 1953 ('AHM'); dan (ii) bahawa polisi itu telah luput. Mahkamah Tinggi membuat keputusan menyebelahi perayu dan tuntutan itu ditolak. Mahkamah Rayuan dalam keputusan sebulat suara mengakas penemuan hakim Mahkamah Tinggi yang memutuskan bahawa dengan ketiadaan penyerahan hartanah amanah kepada pemegang amanah atau pemegang-pemegang amanah menurut s 23 Akta Undang-Undang Sivil 1956 ('AUUS') atau wakil sah, hartanah amanah itu (jumlah yang dijamin oleh polisi tersebut) kekal dalam

tangan perayu sebagai pemegang amanah biasa dari tarikh kematian si mati. Mahkamah Rayuan juga memutuskan bahawa perayu setelah mengisytiharkan yang ia akan membayar wang insurans terus kepada benefisiari, apabila si mati meninggal dunia sebelum tarikh matang, perayu hendaklah diisytiharkan telah dilantik sebagai pemegang amanah konsisten dengan s 23(2) AUUS. Kebenaran untuk merayu telah diberikan kepada perayu untuk tiga persoalan berikut: (i) sama ada polisi insurans hayat yang diambil oleh pengambil insurans ke atas nyawanya sendiri dan dinyatakan untuk faedah isterinya, menurut s 23(1) AUUS, setelah kematian pengambil insurans itu akan menjadikan pengeluar polisi itu (syarikat insurans) sebagai pemegang amanah biasa dari tarikh kematian pengambil insurans, dan oleh demikian apa-apa tindakan yang dimulakan oleh benefisari terhadap syarikat insurans untuk mendapatkan balik hasil kutipan polisi insurans itu terangkum di bawah peruntukan-peruntukan s 22(1)(b) AHM; (ii) sama ada deklarasi oleh syarikat insurans dalam polisi insurans hayat dilaksanakan menurut s 23 AUUS bahawa mereka akan membayar hasil kutipan polisi setelah kematian pengambil insurans yang akan menjadikan syarikat insurans itu sebagai pemegang amanah nyata atau secara alternatif pemegang amanah konstruktif ke atas hasil kutipan polisi; dan (iii) sama ada tuntutan oleh benefisiari ke atas polisi itu mengandungi deklarasi oleh syarikat insurans bahawa mereka akan membayar hasil kutipan polisi itu setelah kematian mengambil insurans, membentuk tuntutan ke atas kontrak, dan bahawa dalam keadaan sedemikian, tuntutan sebegini adalah disekat oleh had masa menurut s 6(1)(a) AHM.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Rayuan:

(1) Di bawah s 23(1) AUUS suatu amanah statutori dibentuk berpihak kepada objek-objek yang dinamakan dalam polisi itu dan wang yang perlu dibayar di bawah polisi itu setakat mana apa-apa objek amanah itu kekal tidak dilaksanakan menjadi sebahagian daripada harta pusaka pengambil insurans atau tertakluk kepada hutang pengambil insurans. Peruntukan-peruntukan tersebut melindungi kepentingan pasangan dan anak-anak pengambil insurans berkaitan wang yang telah dibayar di bawah polisi tersebut terhadap tuntutan pemiutang-pemiutang pengambil insurans (lihat perenggan 9).

(2) Tiada apa dalam s 23 AUUS yang bertujuan untuk melantik perayu sebagai pemegang amanah untuk polisi tersebut. Seksyen 23(4) hanya memperuntukkan bahawa kegagalan apa-apa pelantikan pemegang amanah atau pemegang-pemegang amanah oleh syarikat insurans atau wakil peribadi sahnya akan menjadi pemegang amanah polisi tersebut. Hakikat bahawa polisi tersebut diberikan kepada pemegang amanah untuk faedah benefisiari tidak bermaksud bahawa setelah kematian pengambil insurans wang itu secara automatik dipegang atas amanah

oleh perayu untuk faedah benefisiari sebagai pemegang amanah biasa. Tiada apa-apa dalam s 23 atau dalam terma dan syarat polisi itu sendiri yang menyokong hujah tersebut (lihat perenggan 16).

(3) Berdasarkan peruntukan-peruntukan dalam s 166 Akta Insurans 1996 ('Akta'), adalah jelas bahawa syarikat insurans tidak dianggap sebagai pemegang wang polisi. Bahkan, Akta tersebut memperuntukkan bahawa jika seorang pemegang amanah gagal dilantik, calon atau pemegang awam hendaklah dilantik sebagai pemegang wang polisi itu. Oleh itu kegagalan di pihak perayu untuk membayar wang polisi itu kepada pemegang amanah yang telah dilantik membentuk pelanggaran kewajipan kontraktual terhadap si mati atau calonnya (lihat perenggan 18).

(4) Hubungan antara perayu dan pengambil insurans, dan setelah kematiannya wakil peribadi sahnya, adalah suatu yang kontraktual dan perayu bukan pada bila-bila masa pemegang amanah wang yang perlu dibayar di bawah polisi tersebut. Oleh itu, jika perayu bertindak melanggar terma dan syarat yang dinyatakan dalam polisi tersebut, wakil peribadi perlulah mengambil tindakan undang-undang yang patut terhadap perayu. Sama ada apa-apa wang yang terhutang dan perlu dibayar di bawah polisi tersebut sentiasa tertakluk kepada terma dan syarat polisi tersebut. Hubungan antara syarikat insurans dan pengambil insurans adalah semata-mata hubungan kontraktual (lihat perenggan 19).

(5) Amanah biasa, adalah di mana pemegang amanah di bawah amanah tiada kewajipan kecuali untuk menyerahkan hartanah amanah kepada orang yang berhak kepadanya. Perayu tidak boleh dikatakan memegang apa-apa wang sebagai pemegang amanah biasa untuk responden (lihat perenggan 20).

(6) Persoalan satu dan dua telah dijawab secara negatif dan persoalan ketiga secara positif (lihat perenggan 22).]

Notes

For a case on trustee, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4663.

For cases on trust of life policy, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 186–191.

For cases on trust property generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2497–2510.

For cases on trusts generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2471–2481.

Cases referred to

Jones v Lock (1865–66) LR 1 Ch App 25 (refd)

Kathiravelu, Decd, Re; Sundari v Pemungut Duti Harta Pesaka Tanah Melayu [1973] 2 MLJ 165, HC (refd)
Kishabai v Jaikishan [1981] 2 MLJ 289, HC (refd)
Man bin Mihat, Decd, Re [1965] 2 MLJ 1, HC (refd)

Legislation referred to

Civil Law Act 1956 ss 23, 23(1), (2), (3), (4)
Insurance Act 1996 ss 166, 166(1), (3)
Limitation Act 1953 ss 6, 6(1), 6(1)(a), 22(1)(b)
Married Women's Property Act 1870 (repealed by the Married Women's Property Act 1882) [UK] s 10

Appeal from: Civil Appeal No W-02–815 of 2004 (Court of Appeal, Putrajaya)

Robert Lazar (Ho Kee Tong and Razlan Hadri Zulkifli with him) (Gan, Ho & Razlan Hadri) for the appellant.
Murali Achan (K Kulasekar, Achan & Associates) for the respondent.

Arifin Zakaria CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is a claim by the respondent as administratix of the estate of Martin Raj a/l Anthony Selvaraj ('deceased'). The claim arose out of a policy of insurance taken out by the deceased on his own life for the benefit of his wife, the respondent to this appeal. The High Court dismissed the claim. The respondent succeeded in her appeal to the Court of Appeal. Leave to appeal was subsequently granted to the appellant on the following three questions:

(a) Whether a policy of life insurance effected by a man ('insured') on his own life and expressed to be for the benefit of his wife, pursuant to s 23(1) of the Civil Law Act 1956 will upon the death of the insured constitute the issuer of the policy ('insurer') as a bare trustee from the date of death of the insured, and therefore any action brought by the beneficiary against the insurer to recover the proceeds of the insurance policy will fall within the provisions of s 22(1)(b) of the Limitation Act 1953.

(b) Whether a declaration by an insurer in a policy of life insurance effected pursuant to s 23(1) of the Civil Law Act 1956 that they will pay the proceeds of the policy upon the death of the insured will amount to the insurer being constituted as an express trustee or in the alternative a constructive trustee over the proceeds of the policy.

(c) Whether a claim by the beneficiary on the policy containing a declaration by the insurer that they will pay the proceeds of the policy upon the death of the insured, will constitute a claim on a contract, and that in the circumstances as found, such a claim is barred by limitation pursuant to s 6(1)(a) of the Limitation Act 1953 (Act 254).

THE FACTS

[2] The facts are not in dispute, they are briefly as follows: On 12 June 1992 the deceased took out a policy of life insurance with the appellant. The policy was for the benefit of his wife, the respondent in this appeal. He passed away on 2 March 1993 leaving behind the respondent. A claim under the policy was then made by the respondent against the appellant, this was rejected by the appellant. It was not until 16 July 2004 that this claim was filed by the respondent, this is more than 11 years after the death of the deceased. The appellant resisted the claim on two grounds, namely:

(a) the claim was time barred by virtue of s 6(1) of the Limitation Act 1953 ('LA'); and

(b) that the policy had lapsed.

THE HIGH COURT

[3] The High Court found in favour of the appellant and the claim was accordingly dismissed.

[4] In his grounds of judgment (which is in the national language) the learned trial judge stated that — 'Polisi insuran yang dibuat oleh si mati dengan defendan adalah merupakan satu jenis kontrak. Had masa untuk mengambil tindakan terhadap apa-apa kontrak ialah dalam masa enam tahun. Di dalam tindakan ini, tindakan plaintif dibuat lebih dari 11 tahun, Tidak ada apa-apa alasan diberi oleh plaintif mengapa kelewatan dilakukan untuk memulakan tindakan ini. Di atas alasan itu sahaja tindakan plaintif wajar ditolak'.

[5] The second ground for dismissing the claim was that the policy had lapsed.

THE COURT OF APPEAL

[6] Before the Court of Appeal the appellant conceded on the issue of late payment of premium but maintained that the action was barred by limitation under s 6(1)(a) of the LA as found by the learned trial judge.

[7] The Court of Appeal in a unanimous decision reversing the High Court judge's findings held that:

(a) in the absence of the handing over of the trust property to an appointed trustee or trustees pursuant to s 23 of the Civil Law Act 1956 ('CLA') or a legal representative, the trust property (the sum secured by the policy) remained in the hands of the appellant as bare trustee from the date of the death of the deceased;

(b) that the appellant having declared that it will pay the insurance money directly to the beneficiary, upon the demised of the deceased prior to the maturity date, the appellant must be declared to have been appointed as trustee consistent with s 23(2) of the CLA; and

(c) that 'it would be inequitable, unconscionable and a gross injustice to allow the appellant to extinguish the right of the cestui que trust of a s 23 of the CLA policy of insurance by invoking the purported limitation, when none exist'.

THE ISSUES

[8] I am of the view that the answers to the issues posed to this court turn essentially on the effect to be given to s 23 of the CLA, the relevant part of which reads:

Section 23

(1) A policy of assurance affected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts.

(2) ...

(3) The insured may be the policy or by any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.

(4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.

A (5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court.

B (6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

C **[9]** Section 23 of the CLA had its origin in s 10 of the English Married Women's Property Act 1870, now repealed. By sub-s (1) of s 23 of the CLA a statutory trust is created in favour of the objects named in the policy and the moneys payable under the policy shall not so long as any object of the trust remained unperformed become part of the estate of the insured or be D subject to the debt of the insured. To achieve this purpose the insured may under sub-s (3) appoint a trustee or trustees in respect of the moneys payable. And sub-s (4) provides that in default of such appointment the policy shall immediately vest in the insured and his or her personal representatives in trust for the purpose stated earlier. It is clear that the purpose of these provisions E is to protect the interests of the spouse and children of the insured in the moneys payable under the policy against claim by any creditor of the insured.

[10] The above view was confirmed by Suffian J (as he then was) in *Re Man* F *bin Mihat, Decd* [1965] 2 MLJ 1, where he held that by virtue of s 23 of the Civil Law Ordinance (which is similar to s 23 of the CLA) as the policy of assurance was effected by the assured on his own life and expressed to be for the benefit of his wife, the moneys payable under the policy did not form part of the estate of the deceased. Similar view was expressed by Abdul Hamid J G (as he then was) in *Re Kathiravelu Decd; Sundari v Pemungut Duti Harta Pesaka Tanah Melayu* [1973] 2 MLJ 165. In *Kishabai v Jaikishan* [1981] 2 MLJ 289. BTH Lee J observed that:

> Upon reading the section, it seems clear that the purpose of the section is to protect H the interests of the widow and children of a deceased assured who has created a trust in their favour pursuant to its provisions. In other words, the Legislature, viewing with sympathy any effort by a man to provide for his wife and family after his death, has provided that a man may insure his life at any time for their benefit and any monies payable under the policy shall not go to pay his debts, but shall be held in trust for his family. And so far as this policy of protection carried that I even when it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, the fact will not defeat the trust, but the creditors will be entitled to receive out of the monies payable under the policy, only the sums actually paid by way of premiums — see *In re Yeo Hock Hoe*'s policy per Deane J at p 34.

[11] In this case since the insured did not appoint any person as trustee under sub-s (3) of s 23, therefore, under sub-s (4) the policy shall vest in the insured and upon his death in his legal personal representatives, ie the respondent in this case. This creates a statutory trust in which the moneys payable under the policy is to be held in trust by the insured or on his death by his personal representatives as trustee for the named beneficiary. Therefore, the relationship of trust is one between the insured or his legal personal representatives and the beneficiary. However, in so far as the appellant is concerned it is merely the provider of the insurance policy under a contract of insurance between the appellant and the insured. Therefore, any obligation of the appellant under the policy is strictly contractual in nature. The ownership of the policy will pass to the personal representatives of the insured on his death, who steps into the shoes of the insured and takes over the right of the insured. The right of personal representatives, in the circumstances, is purely a right in contract and not a right under a trust.

[12] The Court of Appeal, however, held that the claim by the respondent herein, is a claim as cestui que trust and not founded on contract. The trust they said came to be created immediately upon the policy being effected by virtue of s 23 of the CLA. Upon the death of the insured the sum insured became due and payable to the beneficiary and since the moneys had not paid to the beneficiary they held that the appellant is now holding the said sum as bare trustee. On that premise the Court of Appeal held that the claim by the respondent must succeed.

[13] Secondly, the Court of Appeal found that the appellant in this case was also appointed as trustee of the policy under s 23(2) of the CLA by reason of the declaration made by the appellant as represented by the chairman and the general manager/registrar of the appellant. This declaration reads:

> MALAYSIAN ASSURANCE ALLIANCE BERHAD will pay upon surrender of this Policy and subject to its provision:
>
> (1) The Face Amount to the Owner if the Insured is the alive on the Maturity Date.
>
> (2) The Face Amount to the Beneficiary upon the death of the Insured prior to the 'Maturity Date' provided that due proof of such death is furnished in form specified by the Company.
>
> MALAYSIAN ASSURANCE ALLIANCE BERHAD has cause this Policy to be issued on the Issue Date.

[14] The Court of Appeal held that the above undertaking is sufficient proof of the fact that the appellant was in fact appointed as trustee by the

A insured consistent with s 23(2) of the CLA. As trustee, the appellant therefore, is liable to pay the insurance moneys to the beneficiary upon the death of the insured.

B **[15]** For the above reasons the Court of Appeal held that the claim is not a claim founded on contract but on trust, therefore, is not caught by s 6 of the LA.

C **[16]** Taking the first point, I agree with the appellant's submission that there is nothing in s 23 of the CLA purporting to appoint the appellant as trustee for the policy. Section 23(4) merely provides that in default of any appointment of a trustee or trustees by the insured then the insured or his or her legal personal representatives will be the trustee of the policy. The fact that the policy is vested in the trustee for the benefit of the beneficiary does not mean that upon the death of the insured the money is automatically held on trust by the appellant for the benefit of the beneficiary as bare trustee. There is nothing in s 23 or in the terms and conditions of policy itself to support such a contention.

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E **[17]** This view is further supported by s 166(1) and (3) of the Insurance Act 1996 (Act 553) which provides as follows:

> (1) A nomination by a policy owner ... shall create a trust in favour of the nominee of the policy moneys payable upon the death of the policy owner, if:
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> (a) the nominee is his spouse or child; or
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> (b) ...
>
> G (2) ...
>
> (3) The policy owner ... may appoint trustees of the policy moneys and where there is no trustee:
>
> (a) the nominee who is competent to contract; or
>
> H (b) the Public Trustee ... shall be the trustee of the policy moneys and the receipt of a trustee shall be a discharge to the licensed insurer for all liability in respect of the policy moneys paid to the trustee.

I **[18]** Based on the provision in s 166 of the Act 553, it is clear that an insurer is not deemed a trustee of the policy moneys. In fact, the Act 553 provides that in default of a trustee being appointed, the nominee or a public trustee shall be appointed as trustee of the policy moneys. It is therefore my view that failure on the part of the appellant to pay the policy moneys over

to the appointed trustee would amount to a breach of its contractual obligation to the deceased or his nominee.

[19] I am also in agreement with the appellant that the relationship between the appellant and the insured, and on his death his personal representatives, is a contractual one and the appellant is at no time the trustee of the moneys payable under the policy. Therefore, in the event the appellant acted in breach of the terms and conditions as spelt out in the policy, it is for the personal representatives to take the necessary legal action against the appellant, as the respondent had done in this present case. It is important to bear in mind that whether any money is due and payable under the policy is subject always to the terms and conditions of the policy. The relationship between the insurer and the insured is purely a contractual relationship.

[20] On the question of bare trust my view is as follows. By definition bare trust, is where the trustee under a trust has no obligation except to hand over the trust property to a person entitled to it. The appellant's contention is that as the claim by the respondent is time barred under the LA, therefore, no money is due and payable to the respondent. It follows, therefore, that the appellant could not be said to be holding any money as bare trustee for the respondent. For these reasons I agree with the appellant that it is wholly erroneous on the part of the Court of Appeal to hold that the appellant is liable to the respondent for the moneys payable under the policy as bare trustee.

[21] As for the declaration contained in the document forming part of the insurance policy attested to by the chairman and general manager/registrar of the appellant, I am of the view that it could not be construed as an instrument appointing the appellant as the trustee of the policy. All it said was that the appellant undertakes to pay upon the surrender of the policy and subject to its provision, the face amount to the owner if he is still alive at the maturity date, or upon his death prior to the maturity date, to pay the face amount to the beneficiary. Again this is nothing more than a contractual undertaking under the policy and could not be construed, as was done by the Court of Appeal, to have the effect of making the appellant the trustee of the policy. To do so in my opinion would go against the well established principle of trust law that a person will not be regarded as having declared himself a trustee of property in the absence of words showing a clear intention to that effect (see *Jones v Lock* (1865–66) LR 1 Ch App 25).

CONCLUSION

[22] For the above reasons I would answer questions (a) and (b) in the negative and question (c) in the positive. In the result I would allow this

A appeal with cost and direct that the respondent bear the costs here and in the courts below. Deposit to be refunded to the appellant. My learned brother Zulkefli Ahmad Makinudin (FCJ) has seen this judgment in draft and has expressed his agreement with it. He has also proposed some addition to the draft, which I have incorporated in this judgment.

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Appeal allowed with costs here and below.

Reported by Kanesh Sundrum

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